120-40

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 1200.

ALBERT S. ROSENBAUM, PLAINTIFF IN ERROR,

vs.

JOHN A. BAUER, TREASURER OF THE CITY AND COUNTY OF SAN FRANCISCO.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED OCTOBER 16, 1886.

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INDEX.

	Original.	Print.
Transcript from State court	1	1
Complaint	1	1
Summons	27	11
Proof of service of summons	29	12
Petition for removal	31	13
Bond for removal	34	14
Order for removal	37	15
Clerk's certificate	39	15
Demurrer	41	16
Order remanding cause	43	16
Certificate to judgment roll	45	17
Opinion	47	17
Bond	54	19
Clerk's certificate	58	20
Writ of error	60	21
Citation	63	23
Proof of service of citation	64	23

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Complaint.

1 In the Superior Court of the City and County of San Francisco, State of California.

ALBERT S. ROSENBAUM, Plaintiff,

vs.

JOHN A. BAUER, Treasurer of the City and County of San Francisco, Defendant.

The plaintiff above named complains of the defendant above named, and, for cause of action, avers that:

I.

The plaintiff is a citizen of the State of New York.

II.

The defendant is, and for more than six months last past has been the Treasurer of the City and County of San Francisco.

III.

On the first day of April, 1872, the Legislature of the State of California passed an Act entitled: "An Act to open and establish a public street in the City and County of San Francisco, to be
2 called 'Montgomery Avenue,' and to take private lands therefor."

IV.

Thereafter, the owners of a majority in frontage of the property described in Section four of said Act, as said owners are and were named in the then last preceding annual assessment-roll for the State, City and County taxes, did petition the then Mayor of said City and County, in writing, for the opening of Montgomery Avenue, according to the provisions of said Act. Said written petition was presented to said Mayor, in the month of June, A. D. 1872; and, upon its face, purported to be, and stated that it was, and it, in fact, was, signed by the owners of a majority in frontage of the property described in Section four of said Act, as said owners were named in the then last preceding annual assessment-roll for said State, City and County taxes. On the 19th day of June, 1872, the then Mayor of said City and County, William Alvord, affixed to said petition his certificate in writing, signed by him in his said official capacity, and bearing the seal of said City and County, which said cer-
3 tificate is in the words and figures following, to wit:

"SAN FRANCISCO, June 19th, 1872.

"MAYOR'S OFFICE,

"*City and County of San Francisco.*

"I, William Alvord, Mayor of the City and County of San Fran-"cisco, do hereby certify that the foregoing petition, accompanied by "the certificates of R. H. Stretch, Surveyor of the City and County

"of San Francisco, and Alexander Austin, Tax Collector of said City "and County of San Francisco, was presented to me, and I find the "same to be in all respects in due form, and that the signatures, on "said petition, are the *bona fide* signatures of the parties repre- "sented, and that they, and each of them, claim to own and hold "said property signed for by them, and each of them, as appears "on the assessment roll of the last preceding annual assessment, "and also as appears by their said signatures, and that such peti-
"tion represents over a majority in frontage of the property
4 "described in Section four of the Act of the Legislature of
"the State of California entitled 'An Act to open and es- "tablish a public street in the City and County of San Francisco, "to be called Montgomery Avenue, and to take private lands there- "for,' approved April 1, 1872, and also a majority in frontage, as "appears by the last preceding annual assessment roll for the State, "City and County taxes, being for the fiscal year of 1871-1872.

"It is, therefore, by me ordered that the Board of Public Works, "as created by Section nineteen of said Act above named, proceed "to organize by the election of a President.

"Witness my hand and official seal this nineteenth day of June, "A. D. 1872.

"[SEAL OF THE CITY AND COUNTY OF SAN FRANCISCO.] WILLIAM ALVORD,

"Mayor of the City and County of San Francisco."

Thereafter, on the 20th day of June, 1872, said Mayor, and the then City and County Surveyor, and the then Tax Collector
5 of said City and County, met together as the Board of Pub- lic Works, named in said Act, and did make and enter, and cause to be entered upon the official record book of the proceed- ings of said Board of Public Works, the following entry, to wit:

"Be it remembered, that on the eighteenth day of June, A. D. "1872, at the Mayor's Office, in the City Hall, in the City and "County of San Francisco, it appearing that the owners of more "than a majority in frontage of all the property described in Sec- "tion four of the Act of the Legislature of the State of California "entitled 'An Act to open and establish a public street in the City "and County of San Francisco, to be called Montgomery Avenue, "and to take private lands therefor,' approved April 1, 1872, and also, "as said owners are named in the last preceding and the last annual "assessment roll for the State, City and County taxes, being for the "year 1871-1872, did petition William Alvord, Mayor of said City
"and County of San Francisco, in writing, for the opening
6 "of Montgomery Avenue, according to the provisions of the
"said Act of the Legislature last above named, which pe- "tition is in words and figures following, to wit:"

(Here in said record book is copied at length the petition herein- above referred to, together with the hereinabove mentioned certifi- cate of said Mayor.)

"Whereupon, on the twentieth day of June, A. D. 1872, at the

"City Hall, in the City and County of San Francisco, said Board of "Public Works, composed of William Alvord, Mayor of the City "and County of San Francisco, Alexander Austin, Tax Collector of "the City and County of San Francisco, and R. H. Stretch, Sur- "veyor of said City and County of San Francisco, proceeded and "did organize by electing

"WILLIAM ALVORD, President thereof,
"and H. S. TIBBEY, Secretary thereof,
"and M. M. ESTEE, Attorney for said Board."

Thereupon, said Board of Public Works, on said 20th day
7 of June, 1872, did organize by electing said Mayor Presi-
dent of said Board; and caused the aforesaid certificate, relating to said petition, to be spread upon the official record-book of their proceedings as such Board of Public Works.

V.

After their organization aforesaid, said Board of Public Works did make a written report, in conformity to and in accordance with the provisions of Section six of said Act. Said report was signed by all the members of said Board. Said report was completed on the 26th day of September, A. D. 1872. Said report was left at the office of said Board, in the City and County of San Francisco, daily, during ordinary business hours, for thirty days from the 26th day of September, A. D. 1872, for the free inspection of all parties interested; and notice that the same was so open for inspection for such time and such place was published by said Board, daily, for
twenty days, in two daily newspapers printed and published
8 in said City and County, the first of said publications being
on said 26th day of September, A. D. 1872.

VI.

No application by petition or otherwise having been made by any person to the County Court of the City and County of San Francisco, setting forth any objection to said report, said Board did, on the 2d day of November, A. D. 1872, present said report to said Court, with petition to said Court that the same be approved and confirmed by said Court. Such proceedings were thereupon had in said Court, that thereafter, to wit: on the 14th day of November, 1872, an order was by said Court duly given, made and entered on its minutes, approving and confirming said report. In said order, said Court does in express words and terms adjudge and decree that, under and pursuant to the provisions of Section five of said Act, on
the 18th day of June, 1872, the actual owners of more than
9 a majority in frontage of the property described in Section
four of the said Act, and the owners of more than a majority in frontage of the property described therein, as the same are named or appeared on the last preceding annual assessment roll for the State, City and County taxes for the City and County of San Francisco, petitioned his Honor, Wm. Alvord, the Mayor of said

City and County of San Francisco, in writing, requesting and demanding the opening of said Montgomery Avenue, according to the provisions of said Act; that all the proceedings taken therein were duly and legally taken; that each and all of the acts, matters, and things provided by said Act to be done and performed by said Board of Public Works in the premises have, on the part of said Board, been duly and regularly done and performed in the form, at the times, and in the manner prescribed by said Act.

No appeal was ever taken by any person from said order of
10 said Court, and the said order, from the entry thereof, has remained and still remains in full force and effect.

VII.

After the order of the County Court aforesaid, and in pursuance of and conformity with the provisions of said Act, said Board of Public Works did execute one thousand five hundred and seventy-nine bonds, in the sum of one thousand dollars each, aggregating in all $1,579,000. Said bonds were dated January 1st, 1873, and were, upon their face, made payable in thirty years from their date, unless sooner redeemed as in the aforesaid Act provided, and bore interest at the rate of six per cent. per annum, payable semi-annually at the office of the Treasurer of said City and County of San Francisco.

To each of said bonds sixty coupons, for the interest thereon, at the rate aforesaid, and payable as aforesaid, were attached.
11 Said bonds were, and each of them was, signed by all the members of said Board of Public Works, and to each of them was affixed the seal of said Board of Public Works. Each of said coupons was signed by the President of said Board of Public Works. Said amount of bonds, to wit: $1,579,000, was the amount necessary to pay and discharge all the damages, cost and expenses arising from or incidental to the opening of said avenue as fixed and determined by the final confirmation aforesaid of the report aforesaid.

VIII.

On the 28th day of November, A. D. 1872, the Mayor, Auditor and Treasurer of said City and County of San Francisco, in pursuance of the provisions of the aforesaid Act, caused to be published—and said publication was continued daily for a period of sixty consecutive days thereafter—in four daily newspapers, published in said City and County of San Francisco, to wit:
12 *Daily Alta California*, *Evening Bulletin*, *Morning Call* and *San Francisco Chronicle*, the following advertisement, to wit:

"Montgomery Avenue Bonds. Sealed proposals will be received at the office of the Treasurer of the City and County of San Francisco, State of California, City Hall, San Francisco, until Tuesday, January 28th, 1873, at 12 o'clock noon, for the purchase of Montgomery Avenue Bonds, authorized to be issued by the Board of Public Works of said City and County, as provided by an Act of the Legislature of the State of California, entitled an Act to open and

establish a public street in the City and County of San Francisco, to be called 'Montgomery Avenue,' and to take private lands therefor, approved April 1st, 1872.

"Said bonds are of the denomination of $1,000 each, payable in thirty years from January 1st, 1873, and bear interest at the
13 rate of six per cent. per annum, payable semi-annually, on the first day of July and the first day of January of each year, at the office of the Treasurer of the City and County of San Francisco. Interest coupons are attached to each bond, and are, at the option of the holder, receivable in payment of all taxes levied under said Act. Principal and interest are payable in gold coin of the United States of America.

"The Act provides for a sinking fund. The damages to be paid for the opening of the avenue amount to the sum of $1,244,737 $\frac{28}{100}$, as ascertained and certified by decree final, on the 14th of November, 1872.

"The property liable under said Act and Decree for the payment of the bonds, principal and interest, is assessed, for the purpose of general taxation for the present fiscal year, at sixty-five millions of dollars, ($65,000,000), and said property stands pledged for
14 the redemption of these bonds.

"Bonds at par, to the amount of one hundred and fifty-eight thousand dollars, ($158,000), have already been accepted by and delivered to parties damaged, leaving one million eighty-six thousand seven hundred and thirty-seven $\frac{28}{100}$ dollars ($1,086,737 $\frac{28}{100}$), to be provided for by the sale of bonds.

"Parties damaged have a preference over other bidders where the bids are at the same rate, to the extent of their assessed damages. Bidders will state the rate per cent. at which they will purchase any portion of said bonds, payable in gold coin of the United States, and each bid must be accompanied by a bond (except from bidders entitled to damages) satisfactory to the Mayor, Auditor and Treasurer, conditional that if any award be made, the terms of the bid will be complied with.

"Bids must be addressed to the Mayor, Auditor and
15 Treasurer of the City and County of San Francisco, City Hall, San Francisco, California, and endorsed 'Proposals for the purchase of Montgomery Avenue Bonds.'

"The Mayor, Auditor and Treasurer reserve the right to reject any and all unreasonable bids.

"Dated at the City Hall, San Francisco, November 27th, 1872.

WM. ALVORD,
Mayor of the City and County of San Francisco,
MONROE ASHBURY,
Auditor of the City and County of San Francisco,
JOHN A. BAUER,
Treasurer of the City and County of San Francisco."

In pursuance of said advertisement, the bonds hereinafter mentioned were, among others, sold and disposed of, for a valuable consideration in money paid by the purchaser, by said Mayor, Treas-

urer and Auditor, and the purchase price thereof was paid to
16 said Treasurer, and by him placed in the "Montgomery Avenue Fund," created by Section ten of the Act of the Legislature hereinabove referred to.

IX.

The sum of money paid out of the General Fund of the Treasury of the City and County of San Francisco, under and in pursuance of an Act entitled "an Act to repeal an Act entitled an Act to make, open and establish a public street in the City and County of San Francisco, to be called Montgomery Avenue, and to take private lands therefor," approved March twenty-ninth, eighteen hundred and seventy, and to provide for the payment of the expenses incurred under said Act, approved March first, eighteen hundred and seventy-two, was not deemed or held by said Board of Public Works, nor by said County Court, to constitute a part of the cost of said
17 Montgomery Avenue, nor was the same included in the report of said Board as finally approved and confirmed by said Court as aforesaid, nor was any part of the money raised by the sale of Montgomery Avenue bonds, as aforesaid, paid into the General Fund of said City and County for the purpose of restoring the sum of money thus paid out, nor for any purpose whatever, nor at all.

X.

After the sale of the Bonds aforesaid, said Board of Public Works caused said Montgomery Avenue to be opened in conformity with the provisions of said Act, and did pay in full all damages and liabilities fixed by the final report of said Board, as approved and confirmed as aforesaid, and did receive from the parties entitled thereto proper conveyances to the City and County of San Francisco for all property taken for the opening of said avenue under the provisions of said Act.

Thereafter, to wit: on the twenty-first day of September,
18 1874, said Board of Public Works did transfer the said avenue so opened, and the possession and control thereof, to the municipal authorities of said City and County of San Francisco, to be forever used as an open public street; said municipal authorities thereupon took and accepted said avenue as an open public street, and caused the same to be sewered, graded, sidewalked, planked and paved in accordance with the rules, regulations, statutes and ordinances applicable to the other public streets of the City and County of San Francisco; and said avenue has ever since been maintained and kept by said municipal authorities in accordance with said rules, regulations, statutes and ordinances as a public street of said city and county; and said avenue ever since has been, and now is, used as an open, public street of said city and county; and the title thereto has been, and now is vested in said city and county
19 for said purpose forever, as the title of other public streets in said city and county is vested. The length of the avenue so opened is 6,226 feet.

XI.

There has been levied, assessed and collected annually, commencing with the year eighteen hundred and eighty, in said city and county, a tax of one per cent. upon each one hundred dollars valuation upon the lands described in Section four of the hereinabove mentioned Act, for a Sinking Fund for the redemption of Montgomery Avenue bonds aforesaid. Said tax was levied, assessed and collected at the same time and in the same manner as other taxes were levied, assessed and collected in said city and county, and upon the lands aforesaid, according to the enhanced value of the respective parcels of said land, as fixed in the hereinabove mentioned final report of said Board of Public Works, as finally
20 approved and confirmed by the County Court as aforesaid.

XII.

The moneys collected by reason and virtue of said tax, when collected, were paid over to the Treasurer of the City and County, and did thenceforth and now do constitute a part of the Montgomery Avenue Fund, to be paid out in redeeming the Montgomery Avenue bonds aforesaid. There is now, and has been for more than a month last past, in the hands of the defendant, as Treasurer, as aforesaid, the sum of $12,318 $\frac{32}{100}$ of moneys paid, as aforesaid, from the tax as aforesaid.

XIII.

Notwithstanding the fact that said defendant, as Treasurer aforesaid, has had in his custody, during the period aforesaid, the aforesaid sum belonging to the said Montgomery Avenue Fund, as a Sinking Fund, yet he has never advertised for the surrender
21 of said Montgomery Avenue bonds, as provided in Section eleven of said Act, or at all.

XIV.

At the sale of said bonds hereinabove mentioned, parties purchased as aforesaid, in good faith and for a valuable consideration and without notice of any defect therein, twenty-one of said bonds, numbered respectively as follows:—

212, 213, 214, 215, 216, 217, 218, 219, 999, 1,000, 1,001, 1,002, 1,003, 1,004, 1,005, 1,006, 1,008, 1,233, 1,234, 1,235 and 1,520, and all coupons of interest then unpaid thereon. Which bonds are all, with the exception of the numbers thereof, in the words and figures following:—

"State of California, United States of America.

"Board of Public Works, City and County of San Francisco,

"$1,000. Number $1,000.

"Montgomery Avenue bond, in conformity with an Act passed by the people of the State of California, represented in Senate and Assembly, entitled 'An Act to open and establish a public street

in the City and County of San Francisco, to be called Mont-
22 gomery Avenue, and to take private lands therefor,' approved April 1, 1872.

"The Treasurer of the City and County of San Francisco, State of California, will pay at his office, in said city and county, to the holder hereof, one thousand dollars in United States gold coin, with interest at the rate of six per cent. per annum, payable semi-annually, in like gold coin, upon surrender of the corresponding coupons, and that the principal sum is redeemable within thirty years from the date of these presents.

"It being understood and agreed that this bond may be redeemed by said Treasurer as provided in said above mentioned Act of the Legislature of the State of California.

"In witness whereof, the Mayor, the Tax Collector, and City and County Surveyor of said City and County of San Francisco, composing a Board of Public Works, have respectively signed these presents, and the President of the Board of Public Works
23 has signed the annexed coupons as of the first day of January, 1873.

[Seal of the Board of Public Works.] WILLIAM ALVORD,
President of the Board of Public Works, and
Mayor of the City and County of San Francisco.
ALEXANDER AUSTIN,
Tax Collector and Member of said Board of Public Works.
RICHARD H. STRETCH,
City and County Surveyor, and Member of said Board of Public Works."

XV.

Plaintiff has been, ever since the purchase hereinabove mentioned, and still is, the owner and holder of the twenty-one bonds aforesaid, having purchased the same in good faith, for a valuable consideration, and without notice of any defect therein.

On the first day of October, 1885, said plaintiff presented
24 himself before the defendant, as Treasurer of the City and County of San Francisco, at his office, and exhibited to him the twenty-one bonds aforesaid, belonging to said plaintiff, and then and there demanded of him, as Treasurer aforesaid, that he do advertise for the space of ten days, Sundays excepted, in two daily newspapers published in the City and County of San Francisco, for sealed proposals, to be opened after the expiration of said ten days, by said Treasurer, in the presence of the Mayor and the bidders, if they or any of them shall elect to be present, for the surrender of bonds issued under the aforesaid Act, stating the amount of money in the custody of said Treasurer for the purpose of said redemption, to wit: $12,318 20.

But said defendant then and there failed, neglected and refused, and ever did and still does fail, neglect and refuse to comply with said demand; and then and there failed, neglected and refused, and ever did and still does fail, neglect and refuse to advertise
25 as requested, or at all, for the redemption of said bonds.

XVI.

Said bonds have not, nor has any one of said bonds, nor any part thereof, nor the money due thereon, ever been paid.

Wherefore, plaintiff prays judgment against said defendant, that said defendant, as Treasurer of the City and County of San Francisco, be commanded to advertise for the redemption of Montgomery Avenue bonds, as in Section eleven of the Act hereinabove referred to provided.

D. M. DELMAS,
Attorney for Plaintiff.

A. L. RHODES AND J. P. HOGE,
Of Counsel.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss.

Joseph Brandenstein, being first duly sworn, doth depose
26 and say: That he is the agent of the above-named plaintiff, Albert S. Rosenbaum, in the State of California; that said plaintiff is absent from said State; that the facts stated in the foregoing Complaint are within the knowledge of affiant, and, therefore, he makes this verification; that the foregoing Complaint is true of affiant's own knowledge.

J. BRANDENSTEIN.

Subscribed and sworn to before me, this twelfth day of October, 1885.

[SEAL.] LEE D. CRAIG,
Notary Public.

[Endorsed.] Filed October 13th, 1885.
JAS. J. FLYNN, Clerk,
By L. J. WELCH, Deputy Clerk.

Summons.

27 In the Superior Court in and for the City and County of San Francisco, State of California.

ALBERT S. ROSENBAUM, Plaintiff, *vs.* JOHN A. BAUER, Treasurer of the City and County of San Francisco, Defendant.	Action brought in the Superior Court, City and County of San Francisco, State of California, and the complaint filed in said City and County of San Francisco, in the office of the Clerk of said Superior Court.

The People of the State of California send greeting to John A. Bauer, Treasurer of the City and County of San Francisco, defendant. You are hereby required to appear in an action brought against you by the above named plaintiff, in the Superior Court, City and County of San Francisco, State of California, and to answer the complaint filed therein within ten days (exclusive of the day of service), after

the service on you of this summons—if served within this
28 county; or if served elsewhere, within thirty days—or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a judgment against said defendant, commanding him to advertise for the redemption of Montgomery Avenue bonds, as in Section eleven, of an Act of the Legislature, entitled "An Act to open and establish a public street in the City and County of San Francisco, to be called 'Montgomery Avenue,' and to take private lands therefor," approved April 1, 1872, provided.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will apply to the Court for the relief demanded in the complaint.

Given under my hand and the seal of the said Superior Court, at the City and County of San Francisco, State of California,
29 this thirteenth day of October, in the year of our Lord one thousand eight hundred and eighty-five.

{ SEAL OF THE SUPERIOR COURT. } JAS. J. FLYNN, *Clerk*,
By L. J. WELCH, *Deputy Clerk*.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
JOHN A. BAUER, Treasurer of the City and County of San Francisco, Defendant,

CITY AND COUNTY OF SAN FRANCISCO—*ss.*

George Lezinsky, being duly sworn, deposes and says: I am and was at all times herein mentioned, a male resident, over the age of twenty-one years, and not a party to the above entitled action; that on the thirteenth (13th) day of October, A. D. 1885, at the City and County of San Francisco, State of California, I personally served the summons issued in the above-entitled action, which is
30 hereto annexed and made a part hereof, on John A. Bauer, Treasurer of the City and County of San Francisco, the defendant therein named, personally known to me to be the defendant therein named, by then and there delivering to said John A. Bauer, Treasurer of the City and County of San Francisco, personally, a copy of said summons, and that a copy of the complaint in the above-entitled action was attached to the copy of the summons delivered to the defendant at the same time and place as aforesaid.

GEO. LEZINSKY.

Subscribed and sworn to before me, this fourteenth day of October, 1885.

[SEAL.] LEE D. CRAIG, *Notary Public*.

Ordered that within summons be filed *nunc pro tunc* as of the fourteenth day of October, 1885.

M. A. EDMONDS,
Judge.

Endorsed: Filed October 21st, 1885, *nunc pro tunc* as of October 14th, 1885, by order of Court. Jas. J. Flynn, Clerk, by S. Aldrich, Deputy Clerk.

Petition.

In the Superior Court of the City and County of San Francisco, State of California.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
JOHN A. BAUER, Treasurer of the City and County of San Francisco, Defendant.

Petition for removal to the Circuit Court of the United States, Ninth Circuit, District of California.

To said Superior Court:—

Your petitioner, Albert S. Rosenbaum, respectfully shows to this Honorable Court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that the petitioner was at the time of the commencement of this suit, and still is, a citizen of the State of New York, and that John A. Bauer was then and still is a citizen of the State of California.

And your petitioner offers herewith a bond, with good and sufficient sureties, for his entering in said Circuit Court of the
32 United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

And he prays this Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said sureties and bond, and to cause the record herein to be removed into the said Circuit Court of the United States in and for the District of California, and he will ever pray.

D. M. DELMAS,
Attorney for Petitioner.

STATE OF CALIFORNIA, }
City and County of San Francisco. } *ss.*

I, D. M. Delmas, being duly sworn, do say that I am the attorney for the petitioner in the above-entitled cause; that I have
33 read the foregoing petition, and know the contents thereof; and that the statements and allegations therein contained are true, I verily believe.

D. M. DELMAS.

Subscribed by the said D. M. Delmas, in my presence, and by him sworn to before me, this sixteenth day of October, A. D. 1885.

[NOTARIAL SEAL.] LEE D. CRAIG, *Notary Public.*

Endorsed: Filed October 16, 1885. Jas. J. Flynn, by D. J. Gordon, Deputy Clerk.

Bond on Removal.

Know all men by these presents, that I, Albert S. Rosenbaum, principal, and Charles Sutro and Gustav Sutro, as sureties,
34 are held and firmly bound unto John A. Bauer in the penal sum of one thousand dollars, for the payment whereof, well and truly to be made unto the said John A. Bauer, his heirs and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Albert S. Rosenbaum having petitioned the Superior Court of the City and County of San Francisco, State of California, for the removal of a certain cause therein pending, wherein Albert S. Rosenbaum is plaintiff, and John A. Bauer, Treasurer of the City and County of San Francisco, is defendant, to the Circuit Court of the United States in and for the District of California: Now if the said Albert S. Rosenbaum, your petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by
35 said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue. Witness our hands and seals this sixteenth day of October, A. D. 1885.

ALBERT S. ROSENBAUM, [L. S.]
By J. BRANDENSTEIN, his attorney in fact.
CHARLES SUTRO. [L. S.]
GUSTAV SUTRO. [L. S.]

STATE OF CALIFORNIA,
City and County of San Francisco. } ss.

We, Charles Sutro and Gustav Sutro, of said city and county, the sureties named in the foregoing bond, being duly sworn, do each for himself depose and say, that I am a resident of the State of California, and a property-holder therein; that I am worth the sum of one thousand dollars over and above all my debts and lia-
36 bilities, and exclusive of property by law exempt from execution; that I have property in the State of California liable to execution of the value of more than one thousand dollars.

CHARLES SUTRO. [L. S.]
GUSTAV SUTRO. [L. S.]

Subscribed in my presence by Charles Sutro and Gustav Sutro, and by them sworn to before me, this sixteenth day of October, A. D. 1885.

[NOTARIAL SEAL.] GEO. T. KNOX, *Notary Public.*

Endorsed: The within bond is hereby approved, this October 16, 1885. M. A. EDMONDS, *Judge.*

Filed October 16, 1885.

JAS J. FLYNN, *Clerk,*
By D. J. GORDON, *Deputy Clerk.*

Order Removing Cause to U. S. Circuit Court.

37 In the Superior Court of the City and County of San Francisco, State of California.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
JOHN A. BAUER, Defendant. } No. 16,150.

The said plaintiff having filed in this Court his petition for the removal of the above-entitled action to the Circuit Court of the United States, Ninth Circuit, District of California, and having offered therewith a bond with sureties for his entering in said Circuit Court, on the first day of its next session, a copy of the record in this action, and for paying all costs that may be awarded by said Circuit Court, if said Court shall hold that this action was wrongfully or improperly removed thereto, it is now ordered that the said bond be and the same hereby is approved; and the said peti-
38 tion being now considered by the Court, it is further ordered that said action be removed to said Circuit Court, and that the Clerk of this Court certify to said Circuit Court all the records and proceedings in said action in this Court.

M. A. EDMONDS,
October 16, '85. *Judge.*

Clerk's Certificate.

I, Jas. J. Flynn, County Clerk of the City and County of San Francisco, State of California, and *ex-officio* Clerk of the Su-
39 perior Court of said city and county, do hereby certify the foregoing to be a full, true and correct copy of the whole of the record in the within action of Albert S. Rosenbaum *vs.* John A. Bauer, Treasurer City and County of San Francisco, now on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of said Superior Court, this twentieth day of October, 1885.

JAS. J. FLYNN,
[SEAL.] *County Clerk and ex-officio Clerk of the Superior Court,*
By D. J. GORDON, *Deputy Clerk.*

Endorsed: Filed October 16, 1885. Jas. J. Flynn, Clerk, by D. J. Gordon, Deputy Clerk.

40 In the Circuit Court of the United States, for the District of California.

Copy of record filed October 22, 1885.

L. S. B. SAWYER, *Clerk.*

41 In the Circuit Court of the United States, Ninth Circuit, in and for the District of California.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
JOHN A. BAUER, Treasurer, &c., Defendant. } Demurrer.

Defendant demurs to plaintiff's complaint, and specifies as grounds of demurrer:—

1st. That the Court has no jurisdiction of the person of the defendant or of the subject of the action.

2d. That there is a defect of parties defendant in this: that the City and County of San Francisco is not made a defendant.

3d. That the complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays judgment to be dismissed hence with its costs.

JOHN L. LOVE,
42 *City and County Attorney,*
Attorney for Defendant.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

JOHN L. LOVE,
City and County Attorney.

Endorsed: Received a copy of within original this twentieth day of November, 1885. D. M. Delmas, attorney for plaintiff.

Filed November 10, 1885.

L. S. B. SAWYER, *Clerk.*

Order Remanding Cause.

At a stated term, to-wit: the November term, A. D. 1885, of the Circuit Court of the United States of America of the Ninth
43 Judicial Circuit, in and for the District of California, held at the Courtroom in the City and County of San Francisco, on Monday, the eighteenth day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present—The Honorable Lorenzo Sawyer, Circuit Judge; the Honorable George M. Sabin, U. S. District Judge of Nevada.

ALBERT S. ROSENBAUM,
vs.
JOHN A. BAUER, Treasurer of the City and County of San Francisco. } No. 3,869.

This cause, heretofore argued and submitted to the Court for consideration and decision upon the demurrer to the complaint herein, having been duly considered, it is ordered that the above-
44 entitled cause be and the same hereby is remanded to the Superior Court of the City and County of San Francisco, State of California, this Court having no jurisdiction of this cause in this form.

I hereby certify that the foregoing is a full, true and correct copy of an order made and entered in the above-entitled cause.

Attest my hand and the seal of said Circuit Court, this eighteenth day of January, 1886.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk*.

Clerk's Certificate.

UNITED STATES OF AMERICA.

45 Circuit Court of the United States, Ninth Circuit, District of California.

A. S. ROSENBAUM,
vs.
JOHN A. BAUER, &c. } No. 3,869.

I, Lorenzo S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, within and for the District of California, do hereby certify that the foregoing papers hereto annexed constitute the roll in the therein entitled action.

Witness my hand and the seal of said Circuit Court, this eighteenth day of January, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON, *Deputy Clerk*.

Endorsed: Roll. Filed January 18, 1886. L. S. B. Sawyer,
46 Clerk, by F. D. Moncton, Deputy Clerk.

Opinion.

47 In the Circuit Court of the United States, Ninth Judicial Circuit, District of California.

A. S. ROSENBAUM,
vs.
JOHN A. BAUER, Treasurer, &c. } No. 3,869.

May 24, 1886.

Before Sawyer, Circuit Judge. A. L. Rhodes, for petitioner; Jno. Lord Love, Sol'r for respondent.

Sawyer, Circuit Judge: This Court has no jurisdiction to entertain an application for a mandamus originally presented therein, except as ancillary to some other proceeding, establishing the demand and reducing it to judgment, and in the nature of process for executing such judgment. *Liebmann* vs. *San Francisco*, 24 Fed. R., 713, 722; *McIntire* vs. *Wood*, 7 Or., 505; *Bath County* vs. *Amy*, 13 Wall., 247–8; *Graham* vs. *Norton*, 15 Wall., 428; *County of Greene* vs. *Daniel*, 102 U. S., 195; *Davenport* vs. *Dodge Co.*, 105 U. S., 242.

Can jurisdiction be conferred upon the Court by commencing the proceeding in the State Court, which has jurisdiction in this
48 form of proceeding, and then removing it to this Court under the Act of 1875? I am satisfied that it cannot. The case of *Claflin* vs. *Com. Ins. Co.*, 110 U. S., 81, 89, relied on by the peti-

us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents.

55 Sealed with our seals. Dated the twenty-ninth day of May, A. D. 1886.

Whereas, the above-named Albert S. Rosenbaum has prosecuted a writ of error to the Supreme Court of the United States to reverse the order and judgment made and rendered by the Circuit Court of the United States, for the District of California, in the cause entitled Albert S. Rosenbaum, plaintiff, *versus* John A. Bauer, Treasurer of the City and County of San Francisco, defendant (No. 3,869), remanding said cause to the State Court of the State of California:

Now, therefore, the condition of this obligation is such that if the above-named Albert S. Rosenbaum shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void, otherwise to remain in full force and virtue.

M. LEWIS. [Seal.]

56 GUSTAV SUTRO. [Seal.]

Signed, sealed and delivered in the presence of Geo. T. Knox.

M. Lewis and Gustav Sutro, being duly sworn, each for himself deposes and says, that he is a householder in said district, and is worth the sum of five hundred dollars in lawful money of the United States of America, exclusive of property exempt from execution, and over and above all debts and liabilities.

M. LEWIS.
GUSTAV SUTRO.

Subscribed and sworn to before me, this twenty-ninth May, 1886.
[SEAL.] GEO. T. KNOX, *Notary Public.*

Endorsed: The form of the within bond and the sufficiency of the sureties therein are hereby approved.

GEO. M. SABIN,
Judge.

57 Filed May 29th, 1886.

L. S. B. SAWYER, *Clerk.*

Clerk's Certificate.

In the Circuit Court of the United States, for the District of California.

ALBERT S. ROSENBAUM, Plaintiff,
vs.
JOHN A. BAUER, Treasurer of the City and County of San Francisco, Defendant.

I, L. S. B. Sawyer, Clerk of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the District of California, do hereby certify that the foregoing fifty-seven written pages, numbered from 1 to 57, inclusive, are a full, true and correct copy of the record and of all proceedings in the therein entitled cause, and that

the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said Circuit Court, this nineteenth day of August, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk.*

UNITED STATES OF AMERICA.—*ss.*

The President of the United States of America to the Judges of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the District of California, greeting:

Because in the record and proceedings, and also in the rendition of the order and judgment of a plea which is in the said Circuit Court, before you, between Albert S. Rosenbaum, plaintiff in error, and John A. Bauer, Treasurer of the City and County of San Francisco, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf; you are commanded, if judgment be herein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the City of Washington, in the District of Columbia, on the eleventh day of October, 1886, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, chief Justice of the Supreme Court of the United States, this twenty-ninth day of May, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the one hundred and tenth.

[SEAL.] L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON, *Deputy Clerk.*

The above writ of error is hereby allowed.

GEO. M. SABIN,
Dist. Judge, Dist. of Nevada, holding said Circuit Court.

The answer of the Judges of the Circuit Court of the United States, for the District of California:—

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

L. S. B. SAWYER, *Clerk.*

Endorsed: No. 3869. In the Supreme Court of the United States. A. S. Rosenbaum *vs.* J. A. Bauer. Writ of error. Filed May 29, 1886. L. S. B. Sawyer, Clerk U. S. Circuit Court, District of California, by F. D. Moncton, Deputy Clerk.

UNITED STATES OF AMERICA.—ss.

To JOHN A. BAUER, Treasurer of the City and County of San Francisco, *Greeting:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the City of Washington, in the District of Columbia, on the eleventh day of October, A. D. 1886, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the District of California, wherein Albert S. Rosenbaum is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the order and judgment in the said writ of error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable George M. Sabin, U. S. District Judge for the District of Nevada, assigned to hold and holding Circuit Court of the United States, for the District of California, this second day of June, A. D. 1886, and of the Independence of the United States, the one hundred and tenth

GEO. M. SABIN,

U. S. District Judge for the District of Nevada, assigned to hold and holding Circuit Court of the United States, for the District of California.

Endorsed: Service of a true copy of the within citation upon me, on this second day of June, 1886, is hereby admitted.

JOHN L. LOVE,

Attorney for the Defendant in Error.

No. 3869. In the Supreme Court of the United States. Albert S. Rosenbaum, plaintiff in error, *vs.* John A. Bauer, Treasurer of the City and County of San Francisco defendant in error. Citation. Filed June 2d, 1886. L. S. B. Sawyer, Clerk U. S. Circuit Court, District of California, by F. D. Moncton, Deputy Clerk.

120-450

FILED
NOV 16 1886
JAMES H. McKINNEY,
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1886.

Nos. 1200 & 1199.

ALBERT S. ROSENBAUM,

Plaintiff in Error,

VS.

JOHN A. BAUER, Treasurer,

Defendant in Error.

AND

ALBERT S. ROSENBAUM,

Plaintiff in Error,

VS.

BOARD OF SUPERVISORS

OF SAN FRANCISCO.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

BRIEF FOR PLAINTIFF IN ERROR.

A. L. RHODES,

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

ALBERT S. ROSENBAUM, PLAINTIFF IN ERROR,

VS.

JOHN A. BAUER, TREASURER, ETC., DEFENDANT IN ERROR.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

The writ in this case was issued under the provisions of Section 5 of the Act of Congress of 1875.

Rosenbaum, the plaintiff in error, is a citizen of the State of New York, and the defendant in error is the Treasurer of the City and County of San Francisco, State of California, and a citizen of California.

The plaintiff in error is the owner of twenty-one (21) bonds, known as Montgomery Avenue Bonds, each for the sum of One Thousand Dollars, issued in 1873, payable in thirty years, bearing interest at six per cent. per annum, and which were issued under the Act of the Legislature of the State of California, approved April 1st, 1872, to defray the expenses of opening a street in San Francisco, known as Montgomery Avenue.

The Statute under which the bonds were issued provides for the creation of a fund for the payment of semi-annual interest, and also for a sinking fund for the redemption of the bonds. The law requires that whenever the Treasurer shall have in his custody Ten Thousand Dollars or more belonging to the sinking fund of the Montgomery Avenue fund, it is his duty to advertise, for a time and in a manner by the Act provided, for proposals for the surrender and redemption of the bonds.

It is alleged that the Treasurer has in his hands, belonging to the sinking fund, more than Twelve Thousand Dollars which should be applied in the manner provided by the Act, for the redemption of the bonds.

The plaintiff exhibited to the Treasurer his bonds, and demanded that he should proceed in the manner provided by the law to advertise for sealed proposals for the redemption of the bonds. The defendant neglected and refused to comply with the demand.

The plaintiff thereupon brought this action of mandamus, to compel the Treasurer to proceed in accordance with the Statute of the State, in applying the money in his hands, belonging to that fund, to the redemption of the bonds.

The action was commenced in the Superior Court of the City and County of San Francisco; and the summons having been issued, and served upon the defendant, the plaintiff filed his petition, in said Superior Court, for the removal of the cause to the Circuit Court for the District of California. Record, p. 13.

Accompanying the petition was a bond, which was duly approved by the Judge of that Court. Record, p. 14. That Court thereupon made an order that the cause be removed to the Circuit Court. Record, p. 15.

After the removal of the cause to the Circuit Court, the defendant filed a demurrer to the plaintiff's complaint, specifying, among other grounds, that the Court had no jurisdiction of the defendant or of the subject matter of the action. Upon the hearing of the demurrer, the Circuit Court made and entered an order remanding said cause from the Circuit Court to the Superior Court of the City and County of San Francisco. Record, p. 16.

ALBERT S. ROSENBAUM,
Plaintiff in Error,

vs.

THE BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO,
Defendant in Error.

The facts in this cause are very similar to those in the cause first above mentioned.

The plaintiff in error in this cause is the plaintiff in the cause first above mentioned.

The defendant in error in this cause is the Board of Supervisors of the City and County of San Francisco.

The plaintiff is the owner of 21 of the Montgomery Avenue bonds, and of eight matured coupons, attached to each bond, each coupon being for the sum of thirty dollars—the interest for six months. The first of them matured January 1, 1882. (Record, p. 10.)

There are no funds in the Treasury applicable to the payment of the above mentioned coupons. (Record, p. 10.)

The Montgomery Avenue Act, Section 11, Stats. Cal., 71-2, p. 919, provides that an annual tax shall be levied upon the property therein mentioned, to raise money for the payment of the coupons attached to the bonds. The tax is required to be levied in the same manner as other taxes are levied, in that City and County. The levy must be made by the Board of Supervisors.

The plaintiff presented to the Board his coupons, and demanded that the above mentioned tax be levied. The Board then, and ever since has, refused to levy the tax. (Record, p. 10.)

The plaintiff commenced this action of mandamus in the Superior Court of said City and County, to compel the Board to levy the tax.

The proceedings, from the petition for removal, up to the order remanding the cause, are the same in this cause as in the cause first above mentioned, except that instead of a demurrer, the defendant filed a motion to remand.

Assignment of Errors.

(For Each Cause.)

1. The Circuit Court erred in holding that said action was not a suit of a civil nature at law or in equity.

2. The said Court erred in holding and deciding that it had no jurisdiction of said action.

3. The Court erred in remanding the cause to the Superior Court of the State.

The plaintiff in error prays that the judgment aforesaid may be reversed.

I.

The Amount in Controversy in Each of these Actions is Sufficient to give the Circuit Court Jurisdiction.

A doubt is intimated by the Court as to whether the causes were within the provisions of Section 2 of the Act of 1875, in respect to the amount in dispute. In the first action—that against the Treasurer—the amount in his hands which would be applied to the redemption of the bonds, exceeds $12,000. Rosenbaum, the plaintiff, holds twenty-one bonds, each for the sum of one thousand dollars, which he demands the Treasurer to redeem—or, in other words, that proper steps be taken under the law, to put the redemption proceedings in motion. He demands that those proceedings be taken on the part of the Treasurer, to initiate the redemption of his bonds.

In the other cause—that against the Board of Supervisors—plaintiff is the owner of the coupons attached to his twenty-one bonds, which matured between January 1st, 1882, and the time of the commencement of the action in December, 1885, making eight coupons of thirty dollars each, attached to each of the bonds. He demands that the Board of Supervisors levy the tax which may be necessary, for the payment of those coupons.

The amount in dispute in each cause exceeds five hundred dollars.

II.

The Action in each of these Causes Comes within the Meaning of Section 2, of the Act of 1875, and is a Suit.

The Circuit Court was of the opinion that an action or proceeding in mandamus was not a suit, which was removable from the State Court to the Circuit Court.

The language of the section is: "That any suit of a civil nature at law or in equity, etc," may be removed.

We think it manifest that it was the intent of the statute to exclude from proceedings which were removable to the Federal Courts, only criminal suits or actions. That section does not mention the words "actions" or "special proceedings," but employs the more comprehensive term, "suit." A suit is an action.

Weston vs. *Charleston*, 2 Pet., 464,

was a writ of prohibition, and the same question was considered as is presented here; and the Chief Justice, in defining a

suit, says: "The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice, which the law affords him;" and it was held that the proceeding was a suit, within the meaning of Section 25 of the Judiciary Act.

The right of removal cannot depend in any degree upon the classification of suits which may be made by the State; nor upon names which the State, through its Legislature, or otherwise, may give to the several kinds of suits, actions or proceedings. Section 2 of the Statute of 1875 employs only the comprehensive term "suit." It would not be competent, we think, for the State to destroy the right of removal, by any species of classification of actions which would exclude therefrom the term "suit." An action for partition of real estate, or for the recovery of real estate, will still remain a *suit*, although the mode of proceedure, the form of the pleadings, and the judgment, may in each instance be prescribed by a statute of the State; and, although each action may, by the State statute, be denominated a "special case."

The State cannot deprive this Court of its appelate power over suits, in which the decision has been made by the highest court of a State, by denominating the suit a "special proceeding," or a "special case," or by giving it another designation. If it be in substance and in effect a suit, the designation that the State may give it, or the classification in which it may arrange the several judicial proceedings which may be had in the State courts, will not impair or affect the judicial power of this Court, in a suit decided by the State court.

This question—whether mandamus is a suit—is set at rest by

Commonwealth of Kentucky vs. *Dennison*, 24 How., 97.

The Chief Justice there says:

"It is equally well settled that mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ."

See also

Kendall vs. *U. S.*, 12 Pet., 615;
Kendall vs. *Stokes*, 3 How., 100;
U. S. vs. *Schurz*, 102 U. S., 39;
Lewis vs. *Brown Township*, 109 U. S., 166.

III.

THE JURISDICTION OF THE CIRCUIT COURT, ON THE REMOVAL OF A CAUSE, IS NOT DEPENDENT UPON THE ORIGINAL JURISDICTION OF THE CIRCUIT COURT.

Lexington vs. *Butler*, 14 Wall., 292,

was a suit brought in the State court in Kentucky, for the recovery of the amount of certain coupons held by the plaintiff. After the commencement of the action in the State Court, it was removed to the Circuit Court upon the petition of the Plaintiff, and it was held that the Circuit Court had jurisdiction of the cause on removal, although it had not original jurisdiction of the suit.

Gaines vs. *Fuentes*, 92 U. S. 17–20,

was a proceeding to annul a will. Its removal to the Circuit Court was sustained, although the Circuit Court did not have original jurisdiction of a proceeding of that character.

Boone vs. *Paterson*, 98 U. S. 404,

was a branch of proceedings for the exercise of the power of eminent domain. *Held*, removable.

Hess vs. *Reynolds*, 113 U. S. 73–77,

was a proceeding for the recovery of a claim against an estate —the proceeding commencing with the presentation of the claim to the administrator, and upon its rejection, issues were framed for trial. *Held*, that it was removable.

Claflin vs. *Com. Ins. Co.*, 110 U. S. 81–89,

seems to be conclusive upon this question. Suit was brought by the assignor, in a State Court, when he could not have brought his suit in the Circuit Court. *Held*, the cause was properly removable.

Davies vs. *Corbin*, 112 U. S. 39,

seems also to be conclusive of this question. It is there held that it required an independent *suit* to procure a writ of mandamus from the Circuit Court; that a judgment in such suit was a judgment in a *civil action;* and that, as such, it was subject to review by this Court.

Should it, however, be considered that the question, as to what cases, causes, actions or proceedings come within the meaning of the term "suit" as employed in Sec. 2, of the Act of 1875, does not pertain exclusively to the jurisdiction of the Federal Courts, we may properly refer to the action of the State in the matter.

The State Constitution of 1863, Art. VI Sec. 6, vested in the District Courts jurisdiction in "cases in equity" and in certain enumerated "cases at law." Neither suits, actions, special proceedings, nor special cases are mentioned in the section conferring jurisdiction; yet it has uniformly been held in the Courts of the State since the case of

Perry vs. *Ames*, 26 Cal. 372,

that the District Courts had jurisdiction to issue writs of mandamus.

The same Constitution, Art. VI, Sec. 4, conferred upon the Supreme Court appellate jurisdiction in "cases in equity," and certain "cases at law," and that Court has uniformly maintained its appellate jurisdiction in cases of mandamus.

Perry vs. *Ames*, 26 Cal. 372.
Carriagua vs. *Dryden*, 30 Cal. 246.
Courtwright vs. *Bear River*, 30 Cal. 583.
Knowles vs. *Yeates*, 31 Cal. 90.

The Constitution Art. VI Sec. 8 conferred upon the County Courts original jurisdiction of certain "actions," not including mandamus. A writ of mandamus having been issued by a County Court, it was held by the Supreme Court that writs of mandamus were not "special cases" and that the County Court did not have jurisdiction to issue the writ.

People vs. *Kern County*, 45 Cal. 679.

The State Constitution of 1879, Art. VI, Sec. 4 and 8, confers upon the Superior Court original jurisdiction, and upon the Supreme Court appellate jurisdiction, of "cases in equity," and "cases at law," and those Courts have continuously exercised jurisdiction in cases of mandamus. We cite only a case appearing in the last volume of the reports,

People vs. *Thompson*, 66 Cal. 398.

There is no earlier case holding the contrary view.

We therefore contend that an action of mandamus, under the judicial system of California is a suit.

And we respectfully submit that the judgment in each of these causes be reversed.

A. L. RHODES,
Attorney for Plaintiff in Error.

A. H. GARLAND,
Attorney for Plaintiff in Error.

The United States courts afford to non-residents remedies commensurate with the remedies given in and by the States where these courts are held.

Payne vs. *Hook*, 7 Wall., 425.
Whitton's Case, 13 *Ib.*, 270.
Thatcher's Pr., 27–33.

Suits of a civil nature at common law are not restricted to the old settled forms of the common law, but include all remedies that are to be administered, not equitable, criminal, or of admirality cognizance.

Thatcher, supra.

The point was recently made that *forcible entry* in Arkansas was not a remedy "under suits at common law." (*St. L. & I. M. R. R. Co.* v. *Johnson*, No. 88 at present term.) But the Court would not entertain the objection.

Respectfully,

A. H. GARLAND,
For Plaintiff in Error.

No. 1200.

In the Supreme Court of the United States.

ALBERT S. ROSENBAUM,
Plaintiff in Error,
vs.
JOHN A. BAUER, Treasurer of the City and County of San Francisco,
Defendant in Error.

TO JOHN A. BAUER :—

Please take notice that the above entitled cause was advanced by said Court, on its docket, at its October Term, 1886, under Rule 32 of said Court, and that the plaintiff in error, Albert S. Rosenbaum, will, on the 17th day of January, 1887, at the opening of said Court, or as soon thereafter as counsel can be heard, move said Court that said cause be submitted to said Court for decision, on the printed brief of said plaintiff in error, a copy of which is hereto attached, and on such printed briefs as said defendant in error may have filed in said Court.

A L Rhodes

Attorney for the Plaintiff in Error.

Service upon me of the foregoing brief and notice by copy is hereby admitted.

November 9, 1886.

John L Love

Attorney for Defendant in Error.

No. 1199.

In the Supreme Court of the United States.

ALBERT S. ROSENBAUM,
Plaintiff in Error,

vs.

The Board of Supervisors of the City and County of San Francisco,
Defendant in Error.

To the Board of Supervisors of the City and County of San Francisco:

Please take notice that the above entitled cause was advanced by said Court, on its docket, at its October Term, 1886, under Rule 32 of said Court, and that the plaintiff in error, Albert S. Rosenbaum, will, on the 17th day of January, 1887, at the opening of said Court, or as soon thereafter as counsel can be heard, move said Court that said cause be submitted to said Court for decision, on the printed brief of said plaintiff in error, a copy of which is hereto attached, and on such printed brief as said defendant in error may have filed in said Court.

J. L. Rhodes

Attorney for the Plaintiff in Error.

Service upon me of the foregoing brief and notice by copy thereof is hereby admitted.

Nov 9, 1886 John L. Love

Attorney for Defendant in Error.

120-24

Office Supreme Court U. S.
FILED.
JAN 17 1887
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1886.

Nos. 1199 & 1200.

ALBERT S. ROSENBAUM,

Plaintiff in Error,

vs.

JOHN A. BAUER, Treasurer,

Defendant in Error.

AND

ALBERT S. ROSENBAUM,

Plaintiff in Error.

vs.

BOARD OF SUPERVISORS
OF SAN FRANCISCO,

Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES.

BRIEF FOR DEFENDANTS IN ERROR.

GEO. FLOURNOY, JR.
City and County Attorney.

PHILIP G. GALPIN,
Of Counsel.

IN THE SUPREME COURT

OF THE UNITED STATES.

ALBERT S. ROSENBAUM,
Plaintiff in Error,

v.

JOHN A. BAUER, TREASURER, ETC.,
Defendant in Error.

Brief for Defendant in Error.

STATEMENT OF FACTS.

The plaintiff seeks a writ of mandate to compel the Treasurer of the City and County of San Francisco to advertise for proposals for the redemption of certain bonds. This advertisement must precede the payment of any bonds, but does not necessarily result in the redemption of those belonging to plaintiff.

These bonds are not in judgment. The writ is to be directed to a person not an "officer of the United States." The matter in controversy is not a property right, but the discharge of a public duty. If this duty be discharged, the plaintiff may receive no pecuniary benefit. Neither the validity of nor title to bonds or coupons belonging to him, are "matters in dispute" in this proceeding.

Points.

I.

The writ of error should be dismissed for want of jurisdiction of this Court.

The appellate jurisdiction of the Supreme Court does not include an order of the Circuit Court remanding to the State Court a petition for a writ of mandate, which involves no property right; or none of the value of five thousand dollars.

Prior to the Act of 1875, an order of the Circuit Court remanding a cause removed from the State Court could not be re-viewed on writ of error; for the reason that by the Acts of Congress appellate jurisdiction was given to the Supreme Court to review judgments only. The true remedy was mandamus.

Ins. Co. *v.* Comstock, 16 Wal., 270.
R. R. Co. *v.* Wiswall, 23 Wal., 508.

According to the above decisions, any party aggrieved was compelled to obtain a mandamus; or, submit to the judgment of the State Courts in the first instance, and reach this tribunal through a writ of error to, or appeal from final judgment.

To obviate this, the Act of 1875, Section 5, provided that the "order of said Circuit Court dismissing or remanding said cause to the State Court shall be re viewable by the Supreme Court on writ of error or appeal, as the case may be."

The effect of this provision, is to put such orders on the same footing as judgments, and bring them within reach of this Court by writ of error—

whenever such orders are otherwise within the limits of the appellate jurisdiction of this Court. But the appellate jurisdiction does not extend to cases where no property right is involved, nor to cases where that right is not capable of exact ascertainment, nor where the property value is less than five thousand dollars. Thus this Court has said: "A writ of error does not lie to re-view a discharge on habeas corpus (Pratt *v.* Fitzhugh, 1 Black., 272), nor to re-view the appointment of a guardian, for "the guardianship is the only matter in dispute, not on account of any pecuniary value attached to the office, but upon other considerations," (2 Blackf., 714); "a controversy is involved in the sense of the statute, whenever any property or claim of the parties *capable* of *pecuniary* estimation is the subject of litigation, and presented in the pleadings for judicial determination."

Gaines *v.* Fuentes, 92 U. S., 20.

"In order to give us appellate power under this section (Act 1789, Ch. 20, Sec. 22; Sec. 669, Rev. Stat.) the matter in dispute must be money—or some right the value of which can be calculated and ascertained." (Ch. J. Taney in Barry *v.* Marcin. 5 How., 119–120.)

It is manifest that the performance or non-performance by the Treasurer of the act of advertising for proposals, although a step necessarily precedent to the payment of the coupons held by plaintiff may result in no benefit to him whatever. All the money may be paid on other coupons and other bonds. The order that the Treasurer should

advertise would not determine any property right of the petitioner nor did the order of the Circuit determine, or refuse to determine any property right presented, nor would the judgment of this Court on this writ of error determine any property right of petitioner.

Nor does the appellate jurisdiction of this Court attach unless the matter in dispute, exclusive of costs, exceeds the sum or value of five thousand dollars.

See Section 691, Rev. Stat., amended Feb'y, 1875; 18 U. S., p. 316.

In certain cases the appellate jurisdiction is given without reference to the value of the matter in dispute. See section 699, Rev. Stat.—but the case of a remand is not included. There is no more reason why the value restriction upon the appellate power of the Supreme Court over cases of removals, should be expunged by construction, than over other cases. There is a value limitation upon the jurisdiction of the Circuit Court in the words of the statute conferring its jurisdiction over removals, and that limitation is the same as in the act conferring its original jurisdiction. In cases of removal the Circuit Court is to take jurisdiction only "where the matter in dispute exceeds exclusive of costs the sum or value of five hundred dollars." Act of 1875, sec. 2, 18 Stat. 472. If the former limitation of the jurisdiction of the Circuit Court as to value be retained, why should not equally the value limitation of the appellate tribunal? Is it true that the matter in dispute must be of the value of five hundred dollars in order to give juris-

diction to the Circuit, but this Court would have jurisdiction on writ of error without reference to value. If so, for what reason? No doubt Congress in providing simply that "the order should be reviewable" intended to abolish the distinction previously made by this Court between orders and judgments, leaving otherwise the appellate jurisdiction of this Court untouched.

For the above reasons, the writ of error should be dismissed.

II.

The Circuit Court has no jurisdiction to render judgment in favor of petitioners, and the cause was properly remanded, because:

1st. No matter is in dispute of the value of five hundred dollars.

2d. No judgment has been obtained to enforce which the mandamus is sought.

As to the 1st reason above assigned:

The statute has not conferred upon the Circuit Court jurisdiction by removal, except in cases involving a property right. The jurisdiction to be acquired by the Circuit Court in removal cases is given in almost the words conferring appellate jurisdiction on this Court. In one case the removal Act of 1875, sec. 2, gives jurisdiction to the Circuit Court "where the matter in dispute exceeds exclusive of costs the sum or value of five hundred dollars."

In the other, the judiciary Act gives this Court appellate jurisdiction on judgments of any Circuit Court, "where the matter in dispute exclusive of

costs exceeds the sum or value of five thousand dollars."

Sec. 691, Revised Stat.

Now, this Court has always held that it had no jurisdiction to review on writ of error, a case where the matter in dispute is not of the value of five thousand dollars (102 U. S., 121; 3 How., 771; 12 Wall., 390); or where it does not involve a right of property (5 How., 119.)

The same cases apply to the jurisdiction of the Circuit over a removed case, and as this petition is for a writ of mandate where no property right is in dispute, " the Circuit acquired no jurisdiction to enter judgment therein in favor of the petitioners." The matter in dispute is that for which suit is brought and in relation to which jurors and witnesses are called.

Lee *v.* Watson, 1 Wall., 339.

III.

The Circuit Court ought to dismiss or remand, any proceeding removed into it from the State Court, if the Circuit Court by reason of its own want of power could give the complainant no relief.

No judgment has been rendered against the Treasurer nor against the Board of Supervisors. This is not a petition for a mandamus, in the nature of process to enforce a judgment.

It is a petition for a mandamus as an original writ. The power of *this Court* to issue such mandamus is restricted, (by Sec. 688, Rev. Stat.) to

* * * "persons holding office under the authority of the United States," and the power of all the Federal Courts is held to be in like manner limited, except only where the writ is issued to enforce a judgment, and in the special case provided for in 18 Stat., p. 333, §4.

It is said in Graham *v.* Norton, 15 Wal., 428: "This express authority to issue writs of mandamus to National Courts and officers, has always been held to exclude authority to issue these writs to State Courts and officers. The only exception is that just reverted to where they have been issued as process to enforce judgment. A writ of mandamus issued by the Circuit Court was therein held to be beyond the jurisdiction of the Circuit Court. Riggs *v.* Johnson County, 6 Wal., 189:" The Court adds: "The absence of the power of the Circuit Courts to issue writs of mandamus, except as auxiliary to a jurisdiction already acquired, is so well explained in Bath Co. *v.* Amy, (13 Wal., 247), that it is unnecessary to pursue the subject further." See also:

McIntire, 1 Wood, 7 Cr., 504.
Greene Co. *v.* Daniel, 102 U. S., 187.
Davenport *v.* Dodge, 105 Id., 237.
Walheley *v.* Muscatine, 6 Wal., 481.
U. S. *v.* U. P. R. R., 2 Dill., 527.

But plaintiff claims that "it matters not whether the Circuit Court originally had jurisdiction under the judiciary Act or not. It has it now because an action of mandamus in the State Court in the nature of an original writ is maintainable; and by

the Act of 1875, a cause of that nature is removable into the Circuit Court; being removed, the Circuit Court is invested with jurisdiction by the Act of 1875, to proceed to judgment in the case, and may render the same judgment that could be rendered by a State Court; and assuming that a State Court would issue the mandate, the Circuit Court may do the same."

On this point, numerous cases are cited in brief of plaintiff to show that the Circuit Courts may entertain jurisdiction in certain removed suits, while they could not have done so before or without the Act of 1875. This may be so. But whatever jurisdiction the Circuit Court acquired by force of the Act of 1875, must be exercised in accordance with the directions of that Act.

Suppose the Circuit had acquired jurisdiction over this petition for a mandamus by force of the Act of 1875, how must the Court act? Is the Court to proceed in the same manner as it would if the cause was pending in the State Court? No. On the contrary "the cause shall then proceed in the same manner as if it had been originally commenced in the said Circuit Court"—Act 1875, § 3.

If this petition had been originally filed in the Circuit Court how would that Court have proceeded? According to the authorities last above cited it would have rendered judgment upon demurrer or on the trial, for defendant. The Circuit Court did dismiss the petition. It sent the petitioner back to the State Court.

It could not have decided to hold the suit and issue the mandate, for that would not have been

"to proceed in the same manner as if the suit had been brought originally" in the Circuit Court.

All of the above argument covers the case of Rosenbaum *v.* Bauer, Treasurer, and enough of it covers Rosenbaum *v.* Supervisors of the City of San Francisco, to warrant us in submitting both cases on these points.

Therefore both cases are herewith respectfully submitted,

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City and County Attorney.

PHILIP G. GALPIN,
Of Counsel.

January 7, 1887.